THE MEANING OF FIRE IN AN INSURANCE POLICY AGAINST LOSS OR DAMAGE BY FIRE.

SUPPOSE that A procures insurance against loss or damage to his house by fire, that he kindles a fire in the house for a useful purpose and without intent to do injury, and that such fire does damage to the house. Suppose further that the fire is kindled by him in a place intended and provided therefor, and does the damage complained of by heat or smoke without causing flame or ignition outside the limits of such place. Suppose, on the other hand, that the fire kindled in the place provided for it starts a fire outside the limits of such place, and that this second fire does the damage. Can A recover under the policy in either event, and if so, when?

It is elementary that a policy of insurance is a contract by the insurer to indemnify the insured against loss by the casualty defined in the policy. The insured pays a sum certain for protection against an event which may or may not occur during the life of the policy. The premium is calculated with respect to the average chance that the given event will ever occur. This is especially the case with fire and marine insurance. It is true that in life insurance the insured is certain to die sometime. Death is an ancient custom for which civilization has as yet found no remedy. But even a life policy is essentially a contingent contract. The contingency is that the insured will die before reaching the average age of risks of his class. The premium is expected to cover the chance that this event will occur. Whether the policy be fire, marine, or life, contingency is the very essence of the contract.

An insurance policy, like other contracts, must be construed with reference to the circumstances under which it was made. The contingent nature of the contract is a controlling and vital circumstance. Indeed it qualifies the very language of the instrument. This language must be construed in the light of the fact

that the premium is calculated upon the average probability of loss. If the insured intentionally causes the loss insured against, he strikes at the essence of the agreement. He intentionally substitutes a certainty for the contingency against which the parties contracted, and on which the premium was based. Even though the policy contains no express provision on the point, the nature of the contract precludes recovery under such circumstances.[1] If the insured intentionally burns the property he thereby avoids his fire policy.[2] If he commits suicide while sane his estate cannot recover upon his life policy.[3] If he intentionally destroys his ship the insurer has a defense to his marine policy.[4] Indeed, sufficiently grave misconduct on the part of the insured,[5] or of an agent for whom he is responsible,[6] is a bar, even though there be no intention to cause loss. Thus where the insured, while racing his steamer against another steamer, broached a barrel of spirits of turpentine close to the mouth of the furnace, in order to use the turpentine for fuel, and thereby set the steamer on fire, he was held to have forfeited his right to recover, although he neither intended nor desired to destroy the vessel.[7] And where the charterer of a vessel, with knowledge of the facts, tried to cross a very hazardous bar,

[1] Vance, Insurance, 476, note 40; May, Insurance, § 407.

[2] Schmidt *v.* New York, etc. Ins. Co., 1 Gray (Mass.) 529; Kane *v.* Hibernia Ins. Co., 39 N. J. L. 697. But if the insured burn the property while insane his act is no defense to the insurer. Karow *v.* Continental Ins. Co., 57 Wis. 56.

[3] Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139; Supreme Commandery *v.* Ainsworth, 71 Ala. 436. The weight of authority, however, permits recovery by a *beneficiary*, even though the insured commit suicide while sane. Patterson *v.* Natural Premium, etc. Ins. Co., 100 Wis. 118, and cases cited; 21 HARV. L. REV. 530. This seems to rest on the theory, held in a number of states, that the beneficiary has a vested interest in the proceeds of the policy, and therefore ought not to be prejudiced by the improper act of the insured who, as to him, is deemed a third party for whom he is not responsible. *Cf.* notes 9–12, *post.*

[4] Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213.

[5] Chandler *v.* Worcester, etc. Ins. Co., 3 Cush. (Mass.) 328; Ostrander, Fire Insurance, 480; May, Insurance, §§ 407, 411. And see Gove *v.* Insurance Co., 48 N. H. 41.

[6] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244. See also Waters *v.* Merchants', etc. Ins. Co., 11 Pet. (U. S.) 213, where the barratry of the master and crew was held a defense to the insurer.

[7] Citizens' Ins. Co. *v.* Marsh, 41 Pa. St. 386. But see Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388, where it was held that one who tried to burn out a bees' nest under the barn door, and thereby destroyed the barn, though without any fraudulent intent, was negligent, but was not guilty of such misconduct as would avoid the policy.

without excuse, and thereby lost the ship, the insured was denied recovery, though neither he nor the charterer intended the loss, on the ground that the insured was legally responsible for the charterer's misconduct.[8] On the other hand, intentional burning of the property by a third party,[9] by the wife [10] or husband [11] of the insured, or even by the agent of the insured while acting beyond the scope of his authority,[12] will not bar recovery by the insured under a fire policy if the insured was not privy to the burning. In the same way destruction of the property by the municipal authorities in order to check the spread of fire is no defense to the insurer.[13] In other words, the peril intended and contemplated by the parties is a peril which is *accidental with respect to the insured.* Indemnity against casualty is the essence of insurance. The nature of the contract itself qualifies the words "death," "fire," or "peril of the sea," by adding the words "accidental with respect to the insured," precisely as if the latter phrase had been expressed.

Yet the fact that the loss is occasioned by the insured will not necessarily bar his recovery. Insurance policies are strictly construed against the insurer because he is usually the author of language used therein. The nature of the policy compelled the courts to hold that where the loss was caused intentionally or by the sufficiently serious misconduct of the insured, there could be no recovery, even though the policy made no express provision for such a case. Such a loss is not a casualty with respect to the insured. But the policy includes any accidental loss which falls within the risks specified. Intentional destruction by a third party without privity of the insured is an accident with respect to the policy-

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[8] Williams *v.* New England, etc. Ins. Co., 3 Cliff. (U. S.) 244.

[9] Westchester F. Ins. Co. *v.* Foster, 90 Ill. 121; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434. See also Hartford F. Ins. Co. *v.* Williams, 63 Fed. 925.

[10] Walker *v.* Phœnix Ins. Co., 62 Mo. App. 209; Midland Ins. Co. *v.* Smith, L. R. 6 Q. B. D. 561, 568 (*semble*). See also Mickey *v.* Burlington Ins. Co., 35 Ia. 174 (negligent act of wife); Gove *v.* Insurance Co., 48 N. H. 41 (property burned by insane wife).

[11] Perry *v.* Mechanics', etc. Ins. Co., 11 Fed. 485; Plinsky *v.* Germania Ins. Co., 32 Fed. 47.

[12] Feibelman *v.* Manchester, etc. Assur. Co., 108 Ala. 180; Henderson *v.* Western, etc. Ins. Co., 10 Rob. (La.) 164.

[13] City Fire Ins. Co. *v.* Corlies, 21 Wend. (N. Y.) 367; Greenwald *v.* Insurance Co., 3 Phila. (Pa.) 323.

holder. A loss innocently caused by the policy-holder is recoverable. In the same way the negligence of the insured or of his agents is deemed a casualty with respect to him. It is true that negligence increases the hazard, but the contingency has not been intentionally turned into a certainty by the insured. There is, therefore, a wide difference in degree between negligence on the one hand, and intentional destruction or misconduct on the other. Moreover, negligence is one of the normal human risks. If the negligence of the insured or his servant were a defense to the insurer, a great part of the value of the policy would vanish. These reasons have led the courts in insurance cases to look on negligence as an innocent accident, rather than as a breach of legal duty. As recovery for loss caused by the insured's negligence can scarcely be said to fly in the face of the policy, it has been generally held that the insurer must expressly except such negligence in order to rely on it as a bar. In the absence of such a stipulation negligence on the part of the insured or his agents is no defense to the insurer.[14] With respect to the policy-holder it is a casualty.

It is, of course, fundamental that where the casualty defined in the policy is fire, the loss for which recovery may be had must be proximately caused by fire within the usual meaning of that word. Scientifically we know that what we call fire is simply a chemical reaction by which oxygen unites with some substance to form a chemical compound. Yet not every such reaction is fire. The rusting of iron, the rotting of wood, the tarnishing of the base metals, are all examples of this reaction. But they are not fire. Fire implies flame or ignition. Thus damage caused by the rending effect of lightning,[15] without actual ignition, is not damage by fire. It has also been held that where property was charred by escaping steam, but without flame or glow, there was no loss within

[14] Vance, Insurance, 476; Ostrander, Insurance, 478; May, Insurance, § 408; Columbia Ins. Co. *v.* Lawrence, 10 Pet. (U. S.) 507; Waters *v.* Insurance Co., 11 Pet. (U. S.) 213; Catlin *v.* Springfield, etc. Ins. Co., 1 Sumner (U. S.) 434; Johnson *v.* Berkshire, etc. Ins. Co., 4 Allen (Mass.) 388; Mickey *v.* Burlington Ins. Co., 35 Ia. 174; Phenix Ins. Co. *v.* Sullivan, 39 Kan. 449; Wertheimer Co. *v.* U. S., etc. Ins. Co., 172 Mo. 135. In Karow *v.* Continental Ins. Co., 57 Wis. 56, the insured, who burned his property while insane, was allowed to recover.

[15] Kenniston *v.* Merrimack Ins. Co., 14 N. H. 341; Babcock *v.* Montgomery, etc. Ins. Co., 6 Barb. (N. Y.) 637; Babcock *v.* Montgomery, etc. Ins. Co., 4 N. Y. 326; Vance, Insurance, 482; Ostrander, Insurance, § 189; May, Insurance, § 406; Wood, Insurance, § 238.

the meaning of the policy.[16] In the same way heat[17] or smoke[18] are not themselves fire, though damage by heat or smoke may be recovered if it be the proximate result of fire within the meaning of the policy.[19] Even injury by "spontaneous combustion" is not a loss by fire unless the combustion be sufficient to produce visible flame or glow. Thus in Western, etc. Co. *v.* Northern Assurance Co.[20] certain wool became wet and was destroyed by spontaneous combustion. The heat was so great that the wool could not be handled with bare hands, but at no time was there visible glow or flame. The court held that such combustion was not fire within the meaning of the policy. Flame, glow, or ignition, then, is an essential element of the fire casualty.

Yet there may be recovery under a fire policy even though the property injured was not even scorched, much less ignited. Generally speaking a fire policy covers not only damage done by the flames, but all damage which is the proximate consequence of fire within the meaning of the policy.[21] Thus in Lynn Gas, etc. Co. *v.* Meriden Fire Ins. Co.[22] a fire in the wire tower of the plaintiff caused a short circuit of the electric current, and this short circuit threw a sudden strain on a fly-wheel in another building and caused the fly-wheel to burst and do much damage. The property so injured was not even warmed by the fire, which was quickly put out. *Held*, that the whole damage is the proximate consequence of fire and so recoverable. In Ermentrout *v.* Girard, etc. Co.[23] a fire in the building of X caused the wall of that building to fall and injure the building of the plaintiff. *Held*, that this was a loss by fire. In the same way damage caused by water used to extinguish

[16] Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[17] Austin *v.* Drewe, 4 Camp. 360; American Towing Co. *v.* German, etc. Co., 74 Md. 25; Gibbons *v.* German, etc. Inst., 30 Ill. App. 263.

[18] Cannon *v.* Phœnix Ins. Co., 110 Ga. 563; Fitzgerald *v.* German American Ins. Co., 62 N. Y. Supp. 824, 30 N. Y. Misc. 72; Samuels *v.* Continental Ins. Co., 2 Pa. Dist. Ct. 397; Austin *v.* Drewe, 4 Camp. 360.

[19] Way *v.* Abington Ins. Co., 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576.

[20] 139 Fed. 637. In 199 U. S. 608 a writ of *certiorari* was denied. *Cf.* Singleton *v.* Phenix Ins. Co., 138 N. Y. 298; Sun Ins. Office *v.* Western, etc. Co., 72 Kan. 41.

[21] Vance, Insurance, 476; Joyce, Insurance, § 2779; Wood, Insurance, §§ 105, 106.

[22] 158 Mass. 570.

[23] 63 Minn. 305.

fire,[24] by removal to avoid fire,[25] by theft during a fire,[26] or even by destruction by the municipal authorities to prevent the spread of fire,[27] are all reckoned as damage by fire. Curiously enough, however, recovery has been denied for damage done by the concussion of a distant explosion of powder,[28] even though an explosion of powder [29] or inflammable vapor [30] is itself fire within the meaning of the policy. Such a loss seems quite as proximate a result of fire as the bursting of the fly-wheel in the Lynn case, *supra*. Certainly these explosion cases are not sufficient to shake the general rule that if the injury to the goods is due to fire as a proximate cause, the loss is recoverable under a fire policy, even though the goods themselves were never ignited. It must be noted, however, that in all these cases, the Lynn case and the explosion cases alike, a fire accidental with respect to the insured was one link in the chain of causation which led up to the injury. The question at issue was whether this link was sufficiently connected with the injury to be the proximate cause of it. It is manifest that such cases do not touch the question as to what is fire within the meaning of an insurance policy.

Fire, then, as used in an insurance policy, implies accidental combustion accompanied by visible flame or glow. Each ingredient is essential. Flame or glow, as an element of combustion, is essential because flame or glow is the earmark of the phenomenon known in common speech as fire. But the word "fire" is also modified by the circumstances under which it is used in the policy. The contingent nature of the contract is a controlling circumstance in its construction. This circumstance cuts down the general word "fire" to "fire which is accidental with respect to the insured."

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[24] Wood, Insurance, § 105; 19 Cyc. 828, note 46.

[25] Balestracci *v.* Firemen's Ins. Co., 34 La. Ann. 844; Independent Ins. Co. *v.* Agnew, 34 Pa. St. 96. But see Hillier *v.* Alleghany, etc. Ins. Co., 3 Barr (Pa.) 470.

[26] Wood, Insurance, § 106; Joyce, Insurance, § 2821; 19 Cyc. 828, notes 47, 48.

[27] See *ante*, note 13.

[28] Everett *v.* London, etc. Co., 19 C. B. N. S. 126; Caballero *v.* Home, etc. Ins. Co., 15 La. Ann. 217.

[29] Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356; Hobbs *v.* Northern Assur. Co., 12 Can. Sup. 631.

[30] Renshaw *v.* Fireman's Ins. Co., 33 Mo. App. 394; Renshaw *v.* Missouri, etc. Ins. Co., 103 Mo. 599. On the other hand, damage by the explosion of a steam boiler is not a loss by fire, since burning or combustion is not the central principle of such an explosion. Millaudon *v.* New Orleans Ins. Co., 4 La. Ann. 15.

The nature of the contract renders this accidental ingredient essential. Unless, therefore, the accidental quality and the glow or flame quality coexist in the proximate cause of the injury, there can be no recovery under a fire policy.

In the light of these principles, the questions at the beginning of this article take on a new aspect. The flame or glow element is undoubtedly present. It is conceded that such flame or glow is the proximate cause of damage to the insured. But is the damage caused by a fire which is accidental with respect to the insured? On this point we must examine the authorities.

The leading case is Austin *v.* Drew,[31] in which the facts were as follows: The premises insured were a sugar manufactory of seven or eight stories. On the ground floor were pans for boiling sugar and a stove to heat them. From the stove a chimney went to the top of the building; and in the chimney was a register which had to be opened when there was fire in the stove. One morning a servant forgot to open the register and in consequence smoke, sparks, and heat were forced into the room where the sugars were drying. One or two men were suffocated in attempting to open the register, but it was finally opened. Had it remained shut much longer the premises would have been burnt down; but in point of fact there never was more fire than was necessary to carry on the manufacture, and the flame never got beyond the flue. The sugars, however, were much damaged by the smoke and still more by the heat. The loss amounted to several thousand pounds. On these facts Chief Justice Gibbs thus instructed the jury:

"I am of opinion that this action is not maintainable. There was no more fire than always exists when the manufacture is going on. Nothing was consumed by fire. The plaintiffs' loss arose from negligent management of their machinery. The sugars were chiefly damaged by heat; and what produced that heat? Not any fire against which the company insures, but the fire for heating the pans, which continued all the time to burn without any excess. . . . If there is a fire it is no answer that it was occasioned by the negligence or misconduct of servants; but in this case there was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But

[31] 4 Camp. 360; Holt N. P. 126; affirmed, 6 Taunt. 436, 2 Marshall, 130.

can this be said where the fire was never at all excessive, and was always confined within its proper limits? This is not a fire within the meaning of the policy nor a loss for which the company undertakes. They might as well be sued for the damage done to drawing-room furniture by a smoky chimney."

In Cannon *v.* Phœnix Insurance Co.[32] the action was brought on a policy against "all direct loss or damage by fire." The proof of loss alleged that a certain stove-pipe in the plaintiff's building became disconnected, and that when a fire was built in the stove beneath, smoke and soot escaped into the second story of the building and did the damage complained of, which amounted to some three thousand dollars. The proof of loss also alleged that the stove-pipe and ceiling became very hot and that part of the damage was caused by water poured on to cool the ceiling. The defendant objected to the admission in evidence of the proof of loss, because the proof nowhere alleged that there was any fire except in the stove where it was intended to be. The trial judge excluded the evidence and there was a nonsuit. In affirming the ruling of the trial judge, Lewis, J., adopts and quotes the following principle, laid down in 1 Wood, Fire Insurance, § 103:

"Where fire is employed as an agent, either for the ordinary purposes of heating the building, for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, *so long as the fire itself is confined within the limits of the agencies employed*, as, from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental. In order to bring such consequences within the risk there must be actual ignition outside of the agencies employed, not *purposely* caused by the assured, and these, as a consequence of such ignition, *dehors* the agencies."

In American Towing Co. *v.* German Fire Insurance Co.[33] a steam-tug, her boiler and machinery, were insured against "all loss or

[32] 110 Ga. 562. *Cf.* Mickey *v.* Burlington Ins. Co., 35 Ia. 174, where a fire kindled under similar circumstances set fire to the building, and the plaintiff recovered.

[33] 74 Md. 25. Compare with this Hazard *v.* New England, etc. Ins. Co., 7 Pet. (U. S.) 557; s. c. below, 1 Sumner (U. S.) 218; Martin *v.* Salem, etc. Ins. Co., 2 Mass. 420; and Rohl *v.* Parr, 1 Esp. 445, in which it was held that injury done by worms was not a "peril of the sea" within the meaning of a marine policy, but simply wear and tear for which there could be no recovery. And in Magnus *v.* Buttemer, 11 C. B. 876, recovery was denied where a vessel was intentionally allowed to take ground while unloading, though the policy covered "standing," because such an injury was mere wear and tear.

damage to the same by fire." A fire occurred on board and did some damage to the hull. The boiler was also injured, but there was conflict in the evidence as to whether the damage to the boiler was caused by the exterior fire or by the fire in the furnaces beneath the boiler. The insurance company conceded its liability for the damage by the fire outside the boiler, and settled therefor. The trial judge instructed the jury in substance that if the damage to the boiler was caused by the fire in the furnaces, and not by fire outside the furnaces, the plaintiff could not recover under the policy. The plaintiff excepted to this instruction. In holding that the instruction was correct, Chief Justice Alvey said:

"The subject of the policy is a steam-tug, her boiler, and other machinery. Of necessity, fire was to be maintained in the furnace, and in contact with the boiler, as a means to generate the motive power by which the vessel could be propelled. . . . The fire while in the furnace was in its proper place and where it was intended to be, and it was placed there to act upon the boiler, which in course of time would be burnt out or warped, as the grate of the furnace would be, by the continued action of fire thereon. And if such results of the action of fire upon these materials while in ordinary use are not within the risk, it would be difficult to say upon what degree of heat or under what conditions the liability under the policy would attach for injury caused by the action of the fire while confined to the furnace and producing no external ignition. If a person has his house insured against all loss or damage by fire, and he should make a fire in his grate or fireplace of such intense heat as to crack his chimney or warp or crack his mantelpieces, it could hardly be contended that he could hold the insurance company liable for such damage, though the damage was unintentionally allowed to be produced by the action of the fire. In such case the fire would not have extended beyond the proper limits within which it was intended to burn; but the heat emitted therefrom would have produced effects not intended by the insured."

In Gibbons *v.* German Insurance and Savings Institution[34] the plaintiff sought to recover, under an ordinary fire insurance policy, for injury and charring caused by steam which escaped from the apparatus by which the rooms were heated. In affirming a judgment for the defendant, Gary, J., after citing Austin *v.* Drew, said:

[34] 30 Ill. App. 263.

"The damage there, was the consequence of negligently omitting to open a proper outlet for the escape of the heat; here, by the accidental opening of an improper one. In each case there was excessive heat, but no fire where it ought not to have been. Fire and heat are not one, but cause and effect; and damage by heat is not insured against in terms and is covered by the policy only when the misplaced fire causes it. If the fire were a moral agent no blame could be imputed to it. It was doing its duty and no more. The damage was caused by another agent who, undertaking to transmit the beneficial influence of the fire, broke down in the task."

In Fitzgerald *v.* German-American Ins. Co.[35] the plaintiff brought action upon a policy against "loss or damage by fire," to recover for injury done by a smoking lamp. There was no fire outside of the lamp itself. In reversing a judgment for the plaintiff, Dunmore, J., said:

"The rule seems to be that where the insured employs fire for economic or scientific purposes, and the fire is confined to the agencies so employed, and damage ensues, without any actual ignition to the property insured, the insurance company is not liable."

In Samuels *v.* Continental Ins. Co.[36] recovery was denied (though without opinion) for smoke damage caused by a flaring lamp, though the flame rose two or three feet above the chimney, but ignited nothing outside the lamp.

In Collins *v.* Delaware Ins. Co.[37] the plaintiff brought action on a fire policy for damage done by a fire in an oil stove. The evidence was conflicting as to whether the fire in the oil stove was confined to the wick, or spread to the oil reservoir. The trial judge in substance charged the jury that if the damage was due to smoke or heat caused by a fire in its proper place in the stove there could be no recovery, but that if the damage was caused by a fire out of its proper place they should find for the plaintiff. The jury found for the plaintiff and the defendant alleged exceptions. In overruling these exceptions Rice, P. J., quoted from Way *v.* Abington, etc. Ins. Co.,[38] and said:

"If a stove should be cracked and spoiled by a fire kindled in it to warm the house, or if a fire in a fireplace should crack the mantel, or

[35] 62 N. Y. Supp. 824; 30 N. Y. Misc. 72.
[36] 2 Pa. Dist. Ct. 397.
[37] 9 Pa. Super. Ct. 576.

scorch valuable furniture left too near it, or injure property by its smoke, which the chimney failed to carry off, or if a lamp should throw off soot or smoke in such quantities as to cause damage to property, in every such case, it may be conceded, if the fire burned nothing but that which was intended to be burned for a useful purpose in connection with the occupation of the house, and if it did not pass beyond the limits assigned to it, the insurance company would not be liable. . . . Again, as was said in Way *v.* Abington Mut. Fire Ins. Co.,[38] a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building, and a fire which starts from such a fire without human agency in a place where fires are never lighted nor maintained." . . .

In Millaudon *v.* New Orleans Ins. Co.[39] the court affirmed a judgment which denied recovery under an ordinary fire policy for damage caused by an exploding steam boiler, where there was no fire except under the boiler.

In O'Connor *v.* Queen Insurance Co.[40] the plaintiff brought action on a standard policy which insured "against all direct loss or damage by fire." The evidence, as to which there was little if any dispute, was that the plaintiff's servant built a fire in the furnace with paper and cannel coal, not used or intended to be used for such purpose, which fire within a few minutes developed to such a degree of fury as to fill the house with great volumes of smoke, soot, and excessive and intense heat, whereby the property was damaged to the extent of some five hundred dollars. The trial judge ruled for the plaintiff. This ruling was affirmed by a divided court, Marshall, J., dissenting. At p. 394 Kerwin, J., thus distinguishes Austin *v.* Drew:

"The foregoing cases,[41] we think, fully show that Austin *v.* Drew, 4 Camp. 360, is not authority against plaintiff here. There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was, in the language of the books, a 'friendly' and not a 'hostile' fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended and in a measure uncontrollable, beside being inherently dangerous because of the unsuitable material

[38] 166 Mass. 67. [39] 4 La. Ann. 15. [40] 140 Wis. 388.

[41] These cases were cases like Lynn Gas Co. *v.* Meriden, etc. Ins. Co., *supra*, where a fire out of its proper place was the proximate cause of the damage, though the property injured was not itself ignited. For a fuller statement of the distinction between those cases and the O'Connor case, see the dissenting opinion of Marshall, J.

used. Such a fire was, we think, a 'hostile' fire and within the contemplation of the policy."

In Way *v.* Abington Mut. Fire Ins. Co.[42] the plaintiff brought action on a Massachusetts standard fire policy to recover for

[42] 166 Mass. 67; Collins *v.* Delaware Ins. Co., 9 Pa. Super. Ct. 576; Mickey *v* Burlington Ins. Co., 35 (Ia.) 174, *acc.*

In Massachusetts two unreported cases in the Superior Court, which were not carried up to the Supreme Court, supplement and are in accord with the *dictum* in Way *v.* Abington, etc. Ins. Co., *supra.* See also *dictum* in Scripture *v.* Lowell, etc. Ins. Co., 10 Cush. (Mass.) 356, 360.

In Breen *v.* Ætna Ins. Co., Suffolk, 1895, No. 6102, the plaintiff declared in the usual manner on a fire policy, and the defendant answered the general denial. The bill of exceptions showed in substance that the defendant insured certain premises of the plaintiff against fire; that said premises were warmed by an ordinary stove; that before leaving the premises on a certain winter's night the plaintiff kindled a fire in said stove and set thereon a peanut roaster full of peanuts to warm over night; that by reason of the arrangement of the dampers of the stove the fire became unusually hot; that the unusual heat developed by the fire was sufficient to crack a wooden post near the stove; that the heat developed by said unusual fire caused the peanuts to give off a thick brown oily smoke which injured the goods and premises of the plaintiff to the extent of two or three hundred dollars; and that the peanuts themselves were eventually charred and consumed. At the close of the evidence the trial judge (Mason, C. J.) ruled that the plaintiff could not recover and directed a verdict for the defendant.

In Clark *v.* Fireman's Fund Ins. Co., Worcester, 1910, No. 8143, the plaintiff declared on a policy insuring his Stanley steam automobile against "loss or damage by fire arising from any cause whatsoever." The answer was a general denial. The case was tried without jury before Sanderson, J., who found as follows:

"The court finds that the plaintiff owned an automobile run by steam and insured by the defendant; that on September 17, 1909, he was operating this automobile on the highway when the water in the boiler became exhausted. The plaintiff filled the tank of the automobile with water and, supposing that it ran in the usual way into the boiler, started the automobile and ran it for some distance when he discovered that no water had gone into the boiler. When this was discovered the boiler was white with heat, the ends of the tubes had become fused and were emitting sparks, and flame was coming out causing damage to the paint, the mud guard, and the sill. The sparks emitted from the ends of the tubes indicated a burning in the sense that there was then an actual uniting of the metal with the oxygen of the air. The amount of damage to the boiler was $214.75, caused entirely by the action of the usual flame in the automobile confined in the place where it was intended to be, upon an empty boiler. The absence of water in the boiler was the proximate cause of the damage to the boiler. The court rules that the plaintiff cannot recover for this damage to the boiler.

"The damage to the paint, the sill, and the mud guard resulted from fire outside of the place where the fire was intended to be, for which the plaintiff is entitled to recover.

"The amount of this damage is thirty-five dollars, with interest from the date of the writ."

damage done by smoke thrown off by a fire in the plaintiff's chimney, which fire was caused by a fire lighted in the stove below. There was no fire except in the stove and in the chimney. The trial judge ruled that the plaintiff could recover. In overruling the defendant's exceptions, Knowlton, J., after stating at some length the argument that there could be no recovery because there was no fire except where fire was intended to be, said:

"We are not disposed to question the soundness of the general principle on which this contention is founded, and we find it by no means easy to determine whether the principle should be extended far enough to cover an occasional fire in a chimney incidental to the ordinary use of a stove, or whether such a fire should be held to be one for whose unexpected and injurious consequences an insurance company should be liable. We are inclined to the opinion that a distinction should be made between a fire intentionally lighted and maintained for a useful purpose in connection with the occupation of a building and a fire which starts without human agency in a place where fires are never lighted nor maintained, although such ignition may naturally be expected to occur occasionally as an incident to the maintenance of necessary fires, and although the place where it occurs is constructed with a view to prevent damage from such ignition. A fire in a chimney should be considered rather a hostile fire than a friendly fire, and as such, if it causes damage, it is within the provisions of ordinary contracts of fire insurance."

In Brown *v.* Kings County Fire Ins. Co.[43] it was held that the insured could recover where he placed a certain rather inflammable ointment on the stove to heat and the ointment ignited and caused the fire complained of.

Another group of cases also bears on the question. Fire policies frequently except explosion of any kind from the peril insured against. Thus the standard fire policy excepts all loss by explosion unless fire ensues, and then imposes liability only for the loss by fire. Explosion, however, may be due to the ignition and rapid combustion of explosive vapor. Sometimes the igniting cause is a gas flame, lighted match, or lighted lamp. Counsel have frequently urged that the gas flame, lamp, or the like is itself fire, that such fire is the proximate cause of the explosion, and that the damage done by the explosion is the proximate result of this precedent fire and so recoverable as a loss by fire irrespective of the explosion ex-

[43] 31 How. Pr. (N. Y.) 508.

ception. This contention has almost invariably failed. It has frequently been held in such a case, that a lighted match,[44] a lighted lamp,[45] a lighted gas jet,[46] or even a furnace fire [47] is not a fire within the meaning of the policy. On the other hand, if an accidental and destructive fire precede the explosion, and the explosion is caused by such fire, the explosion is simply an incident of such destructive fire and the whole loss may be recovered as a fire loss.[48] If, then, the fire policy except damage by explosion, and an explosion occur, the question whether the explosion damage may be recovered as a loss by fire turns on the nature of the fire which preceded and caused the explosion. If the precedent fire be intentionally kindled by the insured for a useful purpose in a place provided therefor, it is not fire for which there can be recovery even though it cause the explosion. If, however, the precedent fire be an accidental fire with respect to the insured, then the damage by explosion is treated as a fire loss, in spite of the explosion exception in the policy. It is evident, therefore, that these explosion cases illustrate very neatly the distinction between accidental and non-accidental fires.

Another question which was suggested by the original case of Austin *v.* Drew still remains to be considered. In that case the court pointed out that the fire was confined to the place intended for it and that it was not excessive. Which factor controls the decision? The direct decisions on this point are singularly few. The explosion cases just discussed do not raise the point on the facts. In each the gas flame, lamp flame, or match flame which caused the explosion seems to have been of the usual size, though this factor seems not to have been noted or relied on. The fire seems not to have been excessive in Cannon *v.* Phœnix Insurance Co., American Towing Co. *v.* German Fire Insurance Co., and Gibbons *v.* German Insurance and Savings Institution, but in none of these

[44] Heuer *v.* Northwestern, etc. Ins. Co., 144 Ill. 393; Mitchell *v.* Potomac Ins. Co., 183 U. S. 42; Vorse *v.* Jersey Plate Glass Ins. Co., 119 Ia. 555.

[45] German-American Ins. Co. *v.* Hyman, 42 Colo. 156; Briggs *v.* North American, etc. Ins. Co., 53 N. Y. 446.

[46] Home Lodge Assur. *v.* Queen Ins. Co., 21 S. Dak. 165; United Life, etc. Ins. Co. *v.* Foote, 22 Oh. St. 340.

[47] St. John *v.* American, etc. Ins. Co., 11 N. Y. 516.

[48] Washburn *v.* Farmers' Ins. Co., 2 Fed. 304; Washburn *v.* Miami, etc. Ins. Co., 2 Fed. 633; Washburn *v.* Artisans' Ins. Co., Fed. Cas. No. 17,212; Washburn *v.* Western Ins. Co., Fed. Cas. No. 17,216; Stephens *v.* Fire Assoc., 139 Mo. App. 369; Vance, Insurance, 480, and see *ante*, notes 44–47.

cases is the non-liability of the insurer placed on that ground. In each case the court relies entirely on the fact that there was no fire except where fire was intended to be. In Samuels *v.* Continental Ins. Co. the flame streamed two or three feet above the lamp chimney, and the court, without opinion, denied recovery. In Fitzgerald *v.* German-American Ins. Co., the other smoking lamp case, it may be inferred that the flame was unusually high, but the court nowhere mentions it.

In Way *v.* Abington Mut. Fire Ins. Co., Collins *v.* Delaware Ins. Co., and Brown *v.* Kings County Ins. Co. the original intentional fire caused a second accidental fire. In the Way case and the Collins case the liability of the plaintiff is placed expressly on the existence of fire where fire was not intended to be, while in the Brown case the point seems to be assumed. In O'Connor *v.* Queen Ins. Co., however, the court permitted recovery because of the excessive and unusual nature of the fire, even though the fire was apparently confined within the place where fire was intended to be; but this position is vigorously assailed in the dissenting opinion of Marshall, J. In this respect the reasoning of practically all the other cases, the text-writers,[49] and *dicta* in Way *v.* Abington Mut. Fire Ins. Co. and American Towing Co. *v.* German Fire Ins. Co., seem to support Justice Marshall. The actual decisions in Samuels *v.* Continental Ins. Co. and in Fitzgerald *v.* German-American Ins. Co. also look the same way. Until O'Connor *v.* Queen Ins. Co. the locus and origin of the fire were treated by courts and text-writers alike as the ground of decision.

The view which makes the locus and origin of the fire the test of its accidental or non-accidental quality with respect to the insured seems more in accord with principle and with authority. The occurrence of fire damage without more cannot be the test. One who intentionally burns the property on which he procured insurance does not recover because the property is ruined. Even though live steam escape from a radiator and do injury, the nature of the furnace fire remains unchanged. The fire in the stove cannot acquire an accidental origin because it scorches a valuable chair. The fire in the fireplace does not become a casualty with respect

[49] Vance, Insurance, 477; Ostrander, Fire Insurance, § 188; Wood, Insurance, § 103; May, Insurance, § 402; Joyce, Insurance, § 2779, 2796; Richards, Insurance Law, 3 ed., 284; Clement, Fire Insurance, 86 and 87.

to the insured because smoke escapes from the chimney and soils his pictures. The consequences which flow from a fire intentionally kindled by the insured can no more reach back and change the nature of that fire than a conclusion can alter the premiss on which it is based.

The size of the fire affords no satisfactory test of its character with respect to the insured. The fact that the lamp was intentionally lighted by the insured still remains, even though the lamp flame stream two feet above the chimney and cast off smoke. Even though the fire in the furnace burn with great fury and fill the house with unintended smoke and heat, there is no fire except that which was intentionally kindled by the servant. Of course, a fire intentionally lighted in a place provided for it may start another fire accidentally outside such place. But such a case must be sharply distinguished from the case where the intentional fire gives out an unusual or unintended amount of heat or smoke. In the former case there are two fires, one intentional and one accidental; in the latter case merely accidental consequences of a fire intentionally kindled by the insured. It is manifest that such consequences cannot reach back and alter the character of the fire which caused them. That character was fixed before the unusual heat or smoke was developed. It follows that it is not material whether the fire which caused the injury was excessive or not excessive. The locus and origin of the fire, not its size, is the logical and proper test of its accidental character.

One other point remains to be considered. Suppose that the injury is caused in part by the accidental fire outside the place intended, and partly by the intentional fire within such place, what is the measure of damages? On this point the writer has found no direct reported decision.[50] But on principle the question seems covered by the cases already discussed. A non-accidental fire is not fire within the meaning of the policy. Even though such fire cause damage it is not recoverable. The result should be the same where the damage is caused in part by an accidental and in part a non-accidental fire. It seems to follow, therefore, that only damage due to the fire outside the place intended should be recovered.[51]

[50] But see Clark *v.* Fireman's Fund Ins. Co., reported by the author, *supra*, note 42.

[51] See Beakes *v.* Phœnix, etc. Co., 143 N. Y. 402; Warmcastle *v.* Scottish, etc. Ins.

In summary, then, we have the following propositions:

1. Fire, within the meaning of an ordinary insurance policy, means combustion which is accidental with respect to the insured, accompanied by visible flame or glow.

2. If the insured, or one for whom he is legally responsible, kindles a fire with intent to injure the premises insured, such fire is not fire within the meaning of the policy for want of the accidental quality.

3. If the insured, or one for whom he is legally responsible, kindles a fire for some useful purpose and without intent to do injury, in a place intended and provided for said fire, such fire while confined within such place is not fire within the meaning of the policy, and any damage done thereby by smoke or heat is not recoverable.

4. The reasoning of the cases and of the text-writers indicates that the same rule would be applied even though such fire so kindled in the place intended therefor were excessive or of unusual size, but the rule in Wisconsin is the other way.

5. If the fire intentionally kindled in a place provided therefor, accidentally causes combustion accompanied by flame or glow outside the limits of the place where the original intentional fire was kindled, the second, or accidental, fire is fire within the meaning of the policy, and any damage done by such accidental fire is recoverable.

6. It seems to follow that where damage is caused in part by an intentional fire and in part by an accidental fire, only such damage as was caused by the accidental fire may be recovered.

In a word, fire, as used in an ordinary fire policy, means fire which is accidental with respect to the insured. Moreover, the accidental quality must attach to the fire itself. An intentional fire plus accidental damage do not constitute accidental fire. In such a case the accidental quality attaches to the loss alone and is no part of the flame which caused the loss. But it is the cause of the loss, not the occurrence of loss, which determines whether

Co., 201 Pa. St. 302; German Am. Ins. Co. *v.* Hyman, 42 Colo. 156. In each of these cases the evidence tended to show that part of the damage was due to a cause included in the policy and that part was due to a cause excepted from the policy. The court in each instance held that the burden was on the plaintiff to show how much of the damage was due to the cause included in the policy and that failure to confine the plaintiff to that measure of damage was reversible error.

there may be recovery. A fire kindled by the insured in a place provided therefor is an intentional fire. It cannot acquire the necessary accidental quality because smoke or heat evolved thereby does damage. The lack of this essential accidental quality *in the fire itself* is fatal to recovery.

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